

### **Criminal punishment for violating a civil commitment order**

How Tarrant County prosecutors tried a sexual predator in front of a jury and won prison time for “technical” violations of his civil commitment

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As I sat anxiously waiting to hear the punishment verdict on the trial of Edward Russell, a sexually violent predator we prosecuted for violating the terms of his civil commitment, I wondered if 12 strangers saw the deception and deviance in this man.

It turns out, they certainly did. On October 12, 2011, the jury foreman read the punishment verdict, finding Russell guilty and assessing a 20-year sentence. A wave of relief came over me.

Russell was not the type of defendant I was used to handling. He was unusual: a 44-year-old, three-time convicted felon who, by his own admission, had molested more than 20 children (depending on the day you asked him). Their innocence was forever stolen, and for the vast majority of those kids, justice was never done.

After Russell had served prison time for sexual assault of a child, he was civilly committed as a sexually violent predator (SVP), a post-prison form of intensive supervision and treatment reserved for only the most extreme criminals. (Read more about such civil commitments at [www.tdcaa.com/node/6860](http://www.tdcaa.com/node/6860).) The intention behind such commitment is to prevent SVPs from hurting more victims and to treat their deviant behavior.

But what if a defendant doesn't follow the requirements of his civil commitment? With Russell's case, we tested whether a jury would agree that “technical” violations of a civil commitment order—Russell's doing things that are legal for the average citizen—deserved an additional prison sentence.

An unforgettable -defendant

I had just finished a four-year term in our Crimes Against Children Unit where I handled cases involving physical and sexual abuse of children. Many child abusers are ingrained in my memory. Don Martin, for example, molested his 7-year-old granddaughter and took explicit photos of her; Kimball Hailey murdered his girlfriend's 2-year-old son. There were countless others I will never forget. However, I never thought I would see someone as deviant, sick, and manipulative as Edward Russell.

The road to his civil commitment began in June 1990 when he was sentenced to one year and a day in prison for the sodomy of a boy under 12 in Alabama. (He later admitted during a psychiatric evaluation that he had molested two brothers, ages 10 and 12, the younger one about 10 times but the older boy “maybe twice because he wasn't really open to it.”)

In 1993 he moved to Canton in East Texas where he rented a room from an unsuspecting family with two young sons. He didn't tell the family he was a convicted sex offender—and he struck again. He was accused of molesting the younger boy while his mother was at work, but he denied the allegations. However, he pled guilty to the charge and received 10 years' probation in 2000, saying, "I agreed to anything they said so I could get probation." However, in a Texas Department of Criminal Justice (TDCJ) Parole Case Summary, he stated that he knew the victim for approximately four years and had abused him four times. "I don't know why I have these urges," Russell stated at the time. He also admitted in his Parole Case Summary that he viewed pornography and had multiple sexual partners during incarceration. He also admitted to abusing more than 14 child victims.

In February 2005, Russell's probation was revoked because he picked up a new case, this time for Failure to Register as a Sex Offender. He was sentenced to four years in prison.

While in prison, Russell was targeted as a candidate for civil commitment. After going through the process on February 25, 2008, Russell was civilly committed by the 435th Judicial District Court in Montgomery County. He was also given a copy of the Final Judgment and Order of Civil Commitment, which explained the terms and conditions of his civil commitment. He was ordered to "strictly comply with the commitment requirements of Health & Safety Code §841.082 ... or be charged with a felony of the third degree." Sexually violent predators who are civilly committed after serving their prison sentences must follow certain conditions, such as completing a daily thought journal (called "doing their homework"), not cussing, not having casual or anonymous sexual encounters, and taking their medication. Abiding by these conditions gives SVPs structure and sets appropriate boundaries for them, while violating these standards might indicate to case managers that an SVP isn't taking his treatment or commitment seriously or, worse, that he might be vulnerable to committing another crime. Though these conditions describe behavior that is legal for the average citizen, they are illegal for an SVP; indeed, Russell signed and affixed his thumbprint on the judgment and order, affirming that he had read and understood them.

On September 5, 2008, Russell was released from TDCJ to Fort Worth, where he moved to the Avalon Half Way house (which, incidentally, is down the street from the Fort Worth Police Department's training academy). There, he met with his case manager, Wesley Griffin, who spent three hours going over the terms and conditions of his civil commitment order.

Within a month of arriving at the Avalon Half Way house, Russell committed several violations, which ranged from not taking his prescribed medication to having casual or anonymous sex. Again, though these actions are not illegal to the average law-abiding person, the importance of complying with the conditions of his civil commitment was clearly spelled out in Russell's order. He was arrested, and his case landed on my desk.

Worth another bite at the apple?

At first glance, I felt like we were trying to get another bite at the apple. Were we really going to prosecute a criminal who actually served his full prison term—even though the United States Supreme

Court upheld the process of civil commitment in *Kansas v. Hendricks*<sup>1</sup>—for not doing his homework and cussing?

Despite the “technical” nature of Russell’s violations, we had a very strong case thanks to a mountain of records collected by ACDA Page Simpson; they came from Avalon Half Way house, Montgomery County, psychotherapy, Tarrant County Mental Health and Mental Retardation, and the Council on Sex Offender Treatment (CSOT).

Russell was charged with three counts of failing to complete his thought journal; two counts of separating from his Global Positioning Service (GPS); one count of failing to take prescribed medication; one count of having casual or anonymous sex; one count of using obscene or threatening language; one count of masturbating to the thought of little boys; and the final and most important count: his discharge from treatment.

We had a repeat offender paragraph in our indictment for Russell’s failure to register as a sex offender conviction, which upgraded his punishment to a second-degree felony. Pre-trial, I offered 15 years in prison in exchange for a guilty plea. Realistically, I expected the defense would counter with 10 years and we would settle for 12 to 13. His defense attorney, Dan Pitzer, explained to me that Russell felt like no matter what he did, the State of Texas would not stop pursuing him until he was imprisoned. According to Russell, the State was trying to “railroad him” and insisted on going to trial.

Alana Minton, chief prosecutor in the Crimes Against Children Unit, tried the case with me. She stressed that we were trying to put someone in prison for technical violations of his commitment order—rather than, say, molesting another child—so we needed to frame it so as to convince 12 jurors that Russell should return to prison for doing things that seemed small and were, in fact, legal for most people to do. We lined up a few experts, including Russell’s case managers, a licensed psychologist who had evaluated Russell, and a treatment provider for SVPs, to testify why following these conditions is so important for SVPs.

This jury trial was going to be a first for our office. Other prosecutors had handled civil commitment violation cases, but the defendants pleaded guilty in one and went through a bench trial in the other (and received a 45-year sentence). Russell’s case would be a first for us.

#### Fingerprint snafu

A vital piece of evidence was the certified copy of the Civil Commitment Order from Montgomery County. I had foolishly assumed the fingerprint on it was good enough to match to Russell. The judgment and order was our link that the person sitting at the defense table was the same as the person who was civilly committed.

Two weeks before trial, I met with Deputy John Pauley of the Tarrant County Sheriff’s Office. He is a fingerprint expert and routinely testifies on behalf of our office. I walked over to his desk in the bowels of the Tarrant County Jail. And when I say bowels, I mean that his desk is under the street, surrounded by glass holding cells containing several inmates.

Deputy Pauley looked at the print through his magnifying glass and then told me he couldn't make an identification, that the print was no good. I began to sweat profusely and nausea built in my stomach. If I lost this trial because I couldn't get the most important piece of evidence admitted, my chief would make me sit in one of those holding cells as punishment.

After a few tense hours, I called the Special Prosecutions Unit (SPU) in Walker County; one of its divisions initiates and pursues civil commitment proceedings. I wanted to find out if Gardell Hatley, the prosecutor who handled Russell's original civil commitment trial, still worked for SPU and might remember—and be able to identify in court—my defendant. Hatley had left the SPU, but with the help of Investigator Mindy Allen, I tracked him down.

He remembered Russell well for two reasons: one, because Russell was supposed to be Hatley's first jury trial, and two, because Hatley had had to use a spreadsheet to keep track of all the children Russell had molested. He agreed to drive to Fort Worth to testify in my case.

#### The trial

Hatley was our first witness. What was so interesting about his testimony was the picture he painted for the jury about the actual civil commitment trial. Hatley was just an intern at the SPU waiting for his bar results when he was handed the Russell case file. The morning of February 5, 2008, Hatley was driving into work when his cell phone rang. The caller informed him that Russell changed his mind and was actually going to agree to civil commitment. (There went his first jury trial, he thought.) Through Hatley, we introduced the final judgment and order of civil commitment, which contained the line, "Edward Russell agrees to civil commitment in accordance with Health & Safety Code, chapter 841." But most importantly, Hatley pointed at Russell and identified him as the same individual who was civilly committed on the judgment and order.

Our second and third witnesses were Wesley Griffin and Lawrence Daniels, Russell's case managers during his civil commitment. We called them to show that they had discussed the terms and conditions with Russell; that he understood those conditions; what conditions he violated and how; and that case managers can ask the Department of Public Safety for an arrest warrant on every violation. Although in practice, case managers rarely get an arrest warrant when SVPs commit small violations, technically, SVPs have committed a third-degree felony the first time they use obscene language or don't do their homework.

If an SVP fails to complete his homework or leaves the halfway house at an undesignated time, the case managers address the situation and let the SVP know what is expected. It is akin to the idea of progressive sanctions. If an SVP violates one of his conditions, his case manager may have him do an additional assignment. If that doesn't work, the manager can move him from the halfway house to a more secure place, such as the Cold Springs facility in Fort Worth. In Fort Worth, an SVP must commit multiple violations over an extended period before his case managers ask DPS for an arrest warrant.

Griffin and Daniels both testified to the timeline of Russell's violations. Russell was read his terms and conditions on September 5, 2008, and within five weeks, he violated them. His first three violations in 2008—on October 13, October 15, and November 10—were for failing to complete his thought journal. Every SVP in treatment must complete a daily thought journal. This allows treatment providers to address any deviant or unhealthy thoughts that the SVP might have. Griffin and Daniels testified that on November 29, Russell failed to take his Zoloft; on December 12, he had a GPS violation; on January 1, 2009, he had casual sex with a halfway house resident; on January 4, he had another GPS violation; and on July 5, he used obscene and sexual language to a fellow resident. After committing eight violations, his case managers decided to place him in the Cold Springs Unit on August 7, 2009, as a punishment.

But the violations didn't stop there. While at Cold Springs, Russell committed more violations: On February 1, 2010, he masturbated to thoughts of little boys (which he later admitted to his case managers) and, three days later, he failed to keep his thought journal. Russell left Cold Springs on April 21, 2010, and the following month, he was discharged from treatment. Case Manager Griffin testified that Russell wasn't vested in his treatment, wasn't taking it seriously, had a poor attitude, and wasn't working the program.

Our next witness was Dr. Stephen Thorne, a licensed psychologist who is in private practice in Austin. He does contract work for TDCJ on evaluating sex offenders for behavioral abnormalities. On June 13, 2007, he had conducted an evaluation of Russell for civil commitment as a sexually violent predator. He testified that he went over the terms and conditions of his evaluation with Russell; he further explained the evaluation would not be confidential or privileged and the evaluation may not be helpful to Russell's current legal case.

Even with these caveats, Russell agreed to talk to Dr. Thorne. Russell described his upbringing and education and admitted to being a victim of sexual abuse by a female cousin when he was 4 years old. Dr. Thorne told the jury that people have a misconception about child molesters and their own victimization. He testified there is no correlation between being the victim of sexual abuse and becoming an abuser. Dr. Thorne testified that Russell had a history of sexually deviant behavior with multiple young male victims. He explained his antisocial orientation and his difficulty complying with probation conditions. He told the jury that Russell committed multiple acts of sexual deviation on several victims and has a limited history of healthy or successful interpersonal and romantic relationships with adults. Dr. Thorne explained how Russell still has sexual thoughts about adolescent males. Finally, he told the jury that, in his opinion, Russell suffers from a behavioral abnormality that makes him likely to engage in predatory acts of sexual violence.

We ended our case with Lawrin Dean, co-owner and clinical director of Psychotherapy Services and Yokefellows in Fort Worth. She has a master's degree in counseling, is a licensed professional counselor, and is a licensed treatment provider for sex offenders. She and her partner, Ezio Leite, another of Mr. Russell's counselors, are two of 12 treatment providers for sexually violent predators in Texas.

She explained why the rules and regulations are important and why, even though some violations seem trivial or unimportant at first glance, they are serious when dealing with an SVP. She testified

about the importance of keeping a thought journal and why participating in treatment is important. A thought journal forces an SVP to look at himself and gain an understanding of the cycle of abuse. It is a fundamental tool in looking at how SVPs rationalize their behavior and, most importantly, it helps treatment providers know what thoughts the SVPs have and how to address them.

She testified that SVPs shouldn't use obscene or sexual language because they need to have clear boundaries. SVPs often use sexual language as "bait" with another person, and treatment providers "don't want them to engage in sexual behavior that reinforces their deviance." When asked about the importance of an SVP abstaining from anonymous or casual sex, she explained that SVPs have no previous healthy sexual relationships. Counselors want to stop the type of behavior to which an SVP is accustomed to "teach" them what a healthy sexual relationship is. She also testified how Russell flirted with the "youngsters" (men in their late 20s) in the halfway house. This concerned her because these "youngsters" were the closest to children Russell had access to at the halfway house.

Dean testified that deviant masturbation "strengthens that attraction" and when you "masturbate to fantasies of male children, you reinforce that attraction." Dean said her goal was for SVPs to have "healthy" masturbation. She testified that Russell minimized his behavior and was not "getting it." She thought the defendant was "manipulative and deceptive" and "he wasn't taking it serious."

Dean also testified about what ultimately caused Russell's unsuccessful discharge. After returning from a stint in the Cold Springs facility, Russell returned to the halfway house, where he took a maintenance polygraph. The polygraph showed he was deceptive when answering questions about his masturbation log. Russell was supposed to keep a log of the thoughts he had during masturbation. In a group session on May 25, 2010, Russell disclosed how he had been "hunching" his mattress while fantasizing about young males. He told the group that he thought he could get by with not reporting this as deviant masturbation because he was not using his hands.

The defense cross-examined all witnesses on the fact that none of these violations are listed in the Penal Code. A normal person could not be arrested for these types of behavior, defense counsel noted. But the jury wasn't buying it. Within 20 minutes of closing arguments, jurors delivered guilty verdicts on every count. The jury would assess punishment, and it was time for them to know just how deviant Russell really is.

## Punishment

At punishment, we again called Dean as well as Russell's other counselor, Ezio Leite. We went through specific admissions Russell made in treatment. Granted, we had hundreds of pages of therapy records, each page more disturbing than the last, but we wanted to focus on the most deviant admissions, including his number of victims. Depending on what day you asked him, Russell had a different answer about how many children he molested. One day it was 10; another it was 15. By the end of his treatment, the number was as high as 25.

Dean testified about a group session on November 20, 2008, when Russell stated he would continuously fantasize about abusing his victims. He told the group he would picture them to be

accepting of his sexual advances and how they would love him in return. Dean further testified about an individual session on May 28, 2009, when Russell admitted he sexually abused his ex-fiancée's 12-year-old son for two years. He also disclosed that he missed the child more than he missed his former fiancée. During another individual session on March 11, 2010, Russell admitted to abusing 18 male and two female children. He stated he accessed these children by first becoming friends with their parents and then gaining their trust.

The coup de grâce was when Leite took the stand. He testified that, during a group session on January 27, 2009, Russell stated that one summer, he got so obsessed with pornography he broke into homes to steal it. He also told the group that around the same time, he touched the vagina of a 1-year-old baby. This is a depravity that most of us can never imagine.

The jury came back in 45 minutes and handed down the maximum on each count: 20 years. I always watch how a defendant reacts to a verdict. Over the years, I have seen grown men break down into tears, pass out, become angry, fake heart attacks, and cry for their mothers. Russell had no reaction; he just stood there. As Alana and I left the courtroom, we started talking about the verdict and Russell's reaction (or lack thereof). We both agreed that in reality, TDCJ is easier for Russell than civil commitment. Within prison regulations, he can masturbate, doesn't have to keep a thought journal, and isn't attached to a GPS device. When he is released from prison and once again civilly committed, I have no doubt he will end up back at the defense table. My hope is for Russell to stay in prison where he belongs.

#### Lessons

I learned many things from this trial. I learned I am not a certified fingerprint expert. I learned that this process truly targets the worst of the worst sex offenders. I learned the system tries to work with these people and that their case managers and therapists truly want them to succeed. I discovered it is imperative for any prosecutor handling a case like this to have the SVP's counselor or therapist testify so that a jury can understand why seemingly technical violations are so significant. Kendall Novak, a Special Crimes Investigator with the DA's Office, interviewed several SVPs at the halfway house. Through him, I learned that the SVPs he interviewed believe there is a light at the end of the tunnel and that the system does work.

Lastly, while most men watch ESPN, I learned that these sex offenders prefer to watch "The Suite Life of Zack and Cody" on the Disney Channel.

As a side note, I would like to thank ACDA Alana Minton and Investigator Novak. Tarrant County is safer because of their hard work and dedication.

#### Endnote

1 521 U.S. 346 (1997).

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